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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002475-MR

ANGELA GRIDER (NOW ANGELA DUNMIRE) APPELLANT

v.

APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 03-CI-00146

JAMES AND FERN WILLIAMS APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: HOWARD, JUDGE; GUIDUGLI AND KNOPF, SENIOR JUDGES.[1]

KNOPF, SENIOR JUDGE: Angela Grider (now Dunmire) appeals from an October 31, 2006 Order of the Woodford Circuit Court denying her motion for sole rather than joint custody of her daughter, C.R. Adopting recommendations of the Domestic Relations Commissioner (DRC), the trial court ruled that changes Grider alleged in both her own and C.R.'s circumstances did not "constitute sufficient grounds to modify custody" and

[1] Senior Judges Daniel T. Guidugli and William L. Knopf sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

thereupon summarily dismissed Grider's motion. Grider contends that her allegations at least merit a hearing, and that the trial court abused its discretion when it denied her that opportunity to establish her claim. We agree and so must vacate the trial court's order of dismissal and remand for additional proceedings.

Grider is the mother of two children, a son, R.R., and C.R., who was born in June 1998. According to Grider, she was the children's sole caretaker when, in early 2000, she was diagnosed with cancer. As a result of her illness, she developed financial and emotional problems and eventually decided that she could no longer care for the children. She made arrangements for her relatives to care for R.R., and asked Fern and James Williams, C.R.'s paternal aunt and uncle, to take C.R. In 2003, following treatment of her cancer and the reestablishment of a stable home, she sought to have her children returned to her. Her relatives returned R.R., but the Williamses refused to give up C.R. In May 2003 they moved for custody as de facto custodians pursuant to KRS 403.270. The matter was heard in July of that year, and in September 2003, noting that five-year-old C.R. was still too young for her preferences to be consulted, the trial court entered an order naming the Williamses and Grider joint custodians, designating the Williamses as primary residential custodians, and awarding Grider reasonable visitation.

Grider maintains that in the years since then her own circumstances have continued to improve. She has married a Frankfort police officer, they have moved into a spacious, three-bedroom apartment, and she is now able to care for her children as a stay-at-home mother. Grider also alleges that there have been significant changes in C.R.'s

circumstances. Whereas prior to 2003 C.R. saw her brother, R.R., infrequently, since the institution of regular visitation she has had the opportunity to become incorporated into Grider's new family and has developed a strong sibling relationship with R.R. As she has matured, moreover, C.R.'s social and educational needs have changed, but, Grider alleges, the Williamses have not involved her in extracurricular activities and have not encouraged her to perform as well as she might have at school. Also, Grider claims, C.R. is old enough now to have preferences regarding her home and has expressed a desire to rejoin more completely her birth family.

As noted above, the DRC opined that even if true, Grider's allegations—the alleged improvement in her own circumstances and the alleged changes in C.R.'s maturing needs and desires—did not justify modifying the existing custody arrangement and so, without a hearing, recommended that Grider's motion be dismissed. In adopting this recommendation, the trial court stated that "[t]he Court gives great deference to the DRC's factual findings because the DRC had an opportunity to observe the witnesses and does not disturb those findings of fact unless they are clearly erroneous. The Court does not find such error." Not only is this statement puzzling inasmuch as the DRC observed no witnesses and made no findings, but rather based his recommendation entirely on the parties' affidavits, it also misconceives the role of the DRC. Under CR 53.06, the trial court owes the DRC's report no deference, but "may adopt [it], or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions." In other words, the "trial court has the broadest possible discretion" in

using the DRC's report to arrive at an independent decision. *Eiland v. Ferrell,* 937 S.W.2d 713, 716 (Ky. 1997). The trial court erred by abdicating its discretion to the DRC. The court also erred by ruling that Grider's allegations could not, if proven, justify a modification in C.R.'s custody.

KRS 403.340 permits the modification of a custody order upon a showing "that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interest of the child." Prior to 2001, the statute incorporated a strong presumption in favor of the custodial status quo by providing that:

> the court shall retain the custodian appointed pursuant to the prior decree unless:
> (a) The custodian agrees to the modification;
> (b) The child has been integrated into the family of the petitioner with consent of the custodian; or
> (c) The child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him; or
> (d) The custodian has placed the child with a defacto custodian.

Noting this strong statutory presumption in favor of custodial stability, our Supreme Court observed in *Quisenberry v. Quisenberry,* 785 S.W.2d 485, 487 (Ky. 1990), that "the provisions of this subsection intend to inhibit further litigation initiated simply because the noncustodial parent, or the child, or both, believe that a change in custody would be in the child's best interest."

Procedurally, KRS 403.350, requires a party seeking a change in custody to submit an affidavit with his motion setting forth facts supporting the requested change. Such facts must establish "adequate cause" for a hearing. Absent that initial showing of "adequate cause," the motion should be summarily denied. *Petrey v. Cain,* 987 S.W.2d 786 (Ky. 1999). Consistent with the pre-2001 version of KRS 403.340, this Court held, in *West v. West,* 664 S.W.2d 948, 949 (Ky. 1984), that the movant's affidavit was required to make "more than prima facie allegations," and must "present facts . . . that compel the court's attention," *i.e.* facts that, if proven, would overcome the statutory presumption and justify the requested modification. Although KRS 403.350 authorizes the trial court to consider the non-movant's counter affidavits, the affidavit procedure is not a substitute for a hearing. It is meant, rather, to ensure that there is a factual basis for the movant's allegations and that the allegations are sufficient under KRS 403.340 to state a colorable claim for custody modification, a claim that should "compel the court's attention." If not, the motion should be summarily denied, but if so, a hearing is required.

In 2001, the General Assembly amended KRS 403.340 and significantly weakened the presumption in favor of the custodial status quo. The amended statute still provides that a custody order may not be modified unless "a change has occurred in the circumstances of the child or his custodian, and . . . the modification is necessary to serve the best interests of the child." But rather than requiring that the custody order remain unchanged unless one of the additional statutory factors be shown, the statute now provides that:

> [w]hen determining if a change has occurred and whether a modification of custody is in the best interests of the child, the court shall consider the following:
> (a) Whether the custodian agrees to the modification;
> (b) Whether the child has been integrated into the family of the petitioner with the consent of the custodian;
> (c) The factors set forth in KRS 403.270(2) to determine the best interests of the child;
> (d) Whether the child's present environment endangers seriously his physical, mental, moral, or emotional health;
> (e) Whether the harm likely to be caused by a change of environment is outweighed by its advantages to him; and
> (f) Whether the custodian has placed the child with a de facto custodian.

This new version of the statute significantly increases the trial court's discretion to modify custody orders. Although a predicate finding of changed circumstances is still required, aside from that the court need only find that the modification is in the child's best interest. It need no longer find, for example, that the custodian has consented to the modification or that the child's present environment seriously endangers his or her health or well being.

Accordingly, "adequate cause" under KRS 403.350 for a custody modification hearing may now be established by an affidavit (or affidavits) which alleges specific facts which, if proven, would show a change in the child's or the custodian's circumstances and the need for modification to serve the child's best interests. Changed circumstances that implicate several of the statutory "best interest" factors should, generally, "compel the court's attention," and will require a hearing. Grider's allegations meet this standard.

The changes Grider alleges in C.R.'s circumstances--her deepened relationship with her brother, her changing social and educational needs as she matures, and her increased capacity for identifying and expressing her own preferences—all implicate factors expressly referred to in KRS 403.270(2) as significant in determining the child's best interest. The sibling relationship would seem particularly important, as would C.R.'s own desires. Indeed, as the DRC who recommended the present custody arrangement himself observed in 2003, C.R. was then too young to express her wishes, but "in the future, say two or three years down the road, the child may wish to live with her mother on a permanent basis." Another important statutory factor implicated in this case is "[t]he circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian." KRS 403.270(2)(i). The apparently desperate circumstances under which Grider was originally forced to enlist the Williamses' assistance and her successful efforts following treatment of her cancer to reestablish her capacity to care for her children are certainly facts tending to "compel the court's attention."

Although Grider's allegations could, if proven, justify a change of custody, this is not to say, of course, that Grider is necessarily entitled to the modification she seeks. The Williamses dispute several of Grider's allegations, and, even if Grider can prove her allegations, under the amended KRS 403.340 stability remains an important interest of both the child and the custodians. An established custody regime ought not to be disturbed merely because it disappoints the party moving for modification. Stability is

not the overriding factor it was under the prior law, however. The amended statute requires the trial court to make a more particularized determination than the old law did of how changed circumstances bear upon the child's best interests. The trial court's summary dismissal of Grider's motion denied her that particularized consideration. Accordingly, we vacate the October 31, 2006 Order of the Woodford Circuit Court and remand for an evidentiary hearing on Grider's claim that she be restored the sole custody of her daughter.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Richard M. Guarnieri
Johnson, True & Guarnieri
Frankfort, Kentucky

BRIEF FOR APPELLEE:

James O. Springate
Versailles, Kentucky